

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KOUNG H. CHINN,
Petitioner,
v.
A.P. KANE, Warden,
Respondent.

No. C 05-3425 CW
ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

Petitioner KOUNG Chinn, proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to title 28 U.S.C. § 2254, challenging as a violation of his constitutional rights the denial of parole by the California Board of Parole Hearings (Board).¹ Respondent Anthony Kane has filed an answer. Petitioner has filed a traverse. Having considered all of the papers filed by the parties, the Court DENIES the petition.

BACKGROUND

On April 11, 1992, Petitioner went to the apartment of Bopha Kim, his child's mother. Kim's brother testified that he heard Petitioner and Kim arguing in her bedroom and that Petitioner was demanding to see his child. The brother heard two small pops and went to the bedroom. He saw Petitioner holding a small pistol. He saw Petitioner try to shoot Kim again, but he believed the gun

¹The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 jammed or was empty because he heard a click. Petitioner fled the
2 scene and was later arrested in New York. An autopsy report showed
3 that Kim was killed by two gunshot wounds to her head.

4 Petitioner plead guilty to second-degree murder and was
5 sentenced to fifteen years to life. The court also found that
6 Petitioner was armed during the commission of the crime but stayed
7 the four year arming enhancement. Petitioner started serving his
8 sentence on December 1, 1992, and his minimum eligible parole date
9 was July 10, 2002.

10 Since his incarceration, Petitioner has had a primarily
11 positive record. His only two disciplinary infractions were a
12 rules violation report in April, 1993 for an identification
13 incident and a counseling memorandum in July, 1996 for failing to
14 report to work. He completed a vocational landscaping course in
15 1996, an entrepreneur development course and a fatherhood class in
16 2000, and a self-help "Impact Workshop" in 2002. Petitioner worked
17 as a dental technician in 2001 and received a laudatory chrono for
18 his work in May, 2001. At the time of the hearing he was working
19 in the vocational print shop and completing a graphic arts course.

20 On May, 25, 2004, Petitioner attended his second parole
21 suitability hearing before the Board. In addition to Petitioner's
22 prison record, the Board considered the following evidence.
23 Petitioner had one prior arrest and conviction for carrying a
24 loaded firearm. He was sentenced to twelve months of probation.
25 Petitioner had no juvenile record but admitted to being involved
26 with a gang prior to 1989. Prior to his conviction, Petitioner had
27 graduated from high school and completed two and a half years of
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1 college. However, Petitioner scored at a 5.2 grade level on a test
2 administered at the prison.

3 The Board considered a report by Petitioner's correctional
4 counselor, who opined that Petitioner would pose a moderate to low
5 degree of threat to the public if released from prison. The
6 counselor found that, although Petitioner "remained disciplinary
7 free for the last ten years" and "has programmed well at work," the
8 commitment crime "remains vicious and appears to be a crime of
9 passion." Respondent's Exhibit 5 at 3.

10 A 2001 mental health evaluation noted that Petitioner was
11 "genuinely remorseful and repentant" and opined that he "would be
12 considered of less than average violence potential within a
13 controlled setting" and in the community, "his violence potential,
14 since he has no history of any other violent crimes, is estimated
15 to be no more than the average citizen in the community."
16 Respondent's Exhibit 6 at 4. The evaluation also predicted that
17 Petitioner "is going to need support within the community" and
18 suggested that he "receive ongoing supportive therapy to assist him
19 in integrating his guilt about the commitment offense." Id.

20 The Board also read an April, 2003 letter from Petitioner's
21 sister, Jennifer Chinn, who said that he would be welcome to stay
22 with her family in Los Angeles. The letter stated, in part, "My
23 husband and I will support you, everything, place to stay, a car,
24 food, and my husband will help you find a job or a living."
25 Respondent's Exhibit 4 at 20. The Board noted that Petitioner did
26 not have any job offers in Los Angeles. Further, Petitioner
27 conceded that he likely would be deported to Cambodia if released
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1 on parole. Petitioner presented two letters dated December 25,
2 2002, from his uncle and cousin in Cambodia, stating that they
3 would employ him at the restaurant they owned because they needed
4 somebody who spoke English. The Commissioner discredited the
5 letter, telling Petitioner that he needed to know "an address [and]
6 the name of the restaurant." Id. at 25. Further, the Commissioner
7 noted that the letter was two years old and did not explicitly
8 offer Petitioner a place to live. Petitioner informed the
9 Commissioner that he had given a more recent letter with the
10 address and a telephone number to his corrections counselor.

11 After brief deliberation, the Board panel concluded that
12 Petitioner was not suitable for parole and would pose an
13 unreasonable risk of danger to society or a threat to public safety
14 if released and issued a two-year denial of parole. In support of
15 its decision, the Board stated that the commitment offense "was
16 carried out in an especially violent and cruel manner" and noted
17 that the crime left Petitioner's daughter without a mother.
18 Further, the Board found that Petitioner "lack[ed] realistic parole
19 plans" citing the perceived deficiencies in the letters regarding
20 his plans in Cambodia. Id. at 33-34.

21 The Board also found that "it is not reasonable to expect that
22 parole would be granted at a hearing during the following two
23 years." Id. In the interim, the Board suggested that Petitioner
24 seek "additional self-help to discuss, understand, and cope with
25 stress in a non-destructive manner" and to clarify his parole
26 plans. Id.

27 On September 15, 2004, Petitioner filed in Los Angeles County
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1 Superior Court a petition for a writ of habeas corpus challenging
2 the Board's decision and asserting that the denial of parole
3 violated his plea agreement. In its reasoned opinion, the court
4 denied the petition, finding that some evidence supported the
5 Board's denial of parole. However, it held that no evidence
6 supported the Board's finding that the commitment offense was
7 especially violent and cruel because it was carried out in a
8 dispassionate and calculated manner. The court also found that
9 "Petitioner entered into an indeterminate plea agreement, to which
10 the Board was not a party, that provided for a minimum sentence of
11 fifteen years and a maximum of life." Respondent's Exhibit 7 at 2
12 (emphasis in original). Therefore, the court found that
13 Petitioner's claim based on his plea agreement was without merit.
14 After the court of appeal and California Supreme Court denied his
15 petition summarily, Petitioner brought a federal habeas petition in
16 this Court.

17 LEGAL STANDARD

18 Because this case involves a federal habeas corpus challenge
19 to a State parole eligibility decision, the applicable standard is
20 contained in the Antiterrorism and Effective Death Penalty Act of
21 1996 (AEDPA). McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir.
22 2002). Under AEDPA, a district court may not grant habeas relief
23 unless the State court's adjudication of the claim: "(1) resulted
24 in a decision that was contrary to, or involved an unreasonable
25 application of, clearly established Federal law, as determined by
26 the Supreme Court of the United States; or (2) resulted in a
27 decision that was based on an unreasonable determination of the
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1 facts in light of the evidence presented in the State court
2 proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S.
3 362, 412 (2000). A federal court must presume the correctness of
4 the State court's factual findings. 28 U.S.C. § 2254(e)(1).

5 Respondent concedes that Petitioner has exhausted his State
6 remedies by filing the petition for a writ of habeas corpus in the
7 California Supreme Court. Where, as here, the highest State court
8 to reach the merits issued a summary opinion which does not
9 explain the rationale of its decision, federal court review under
10 § 2254(d) is of the last State court opinion to reach the merits.
11 Bains v. Cambra, 204 F.3d 964, 970-71, 973-78 (9th Cir. 2000). In
12 this case, the last State court opinion to address the merits of
13 Petitioner's claim is the opinion of the Los Angeles County
14 Superior Court.

15 DISCUSSION

16 I. Jurisdiction

17 Respondent argues that the Court does not have subject matter
18 jurisdiction because State parole matters do not constitute a
19 federal question on the grounds that denial of parole does not
20 affect a constitutionally protected liberty interest. Respondent
21 relies on In re Dannenberg, 34 Cal. 4th 1061 (2005), for the
22 proposition that California prisoners have no liberty interest in
23 parole and thus have no federal due process rights in connection
24 with parole eligibility. However, the Ninth Circuit has rejected
25 this contention. Sass v. California Bd. of Prison Terms, 461 F.3d
26 1123, 1128 (9th Cir. 2006). Therefore, the Court has subject
27 matter jurisdiction under 28 U.S.C. § 2254 to decide whether
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1 Petitioner's Fourteenth Amendment right to due process was
2 violated by the Board's determination that he was not suitable for
3 parole.

4 II. Due Process Claim

5 Petitioner asserts that his due process rights were violated
6 by the Board's decision because no evidence supports its finding
7 that he is unsuitable for parole. Because California prisoners
8 have a constitutionally protected liberty interest in release on
9 parole, they cannot be denied a parole date without the procedural
10 protections necessary to satisfy due process. McQuillion, 306
11 F.3d at 902. A parole board's decision must be supported by "some
12 evidence" to satisfy the requirements of due process.

13 Superintendent v. Hill, 472 U.S. 445, 455 (1985); McQuillion, 306
14 F.3d at 904; Morales v. California Dep't of Corrections, 16 F.3d
15 1001, 1005 (9th Cir. 1994), rev'd on other grounds, 514 U.S. 499
16 (1995). The evidence underlying the board's decision must have
17 some indicia of reliability. McQuillion, 306 F.3d at 904; Jancsek
18 v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987).

19 The California court rejected the Board's finding that
20 Petitioner's commitment crime was especially violent and cruel.
21 Nonetheless, the court noted that the facts of the crime "were
22 enough to establish more than the minimum necessary for a
23 conviction of second-degree murder." Respondent's Exhibit 7 at 1.
24 Further, the court found support for the Board's conclusion that
25 Petitioner "lacks realistic parole plans," because the letters
26 from his family in Cambodia "were two years old and not specific
27 regarding potential living arrangements." Id. at 2. Based on
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1 these findings, the court found that there was "'some evidence' to
2 support the Board's conclusion." Id.

3 Petitioner argues that the Board's finding that the nature of
4 his offense outweighed the positive aspects of his profile was not
5 supported by the evidence. Petitioner cites Biggs v. Terhune, 334
6 F.3d 910, 915-16 (9th Cir. 2003), in support of his argument that
7 "given his over six years of disciplinary free prison performance
8 and his on-going positive programming, the gravity of his offense
9 and his previous criminal history can no longer provide the some
10 evidence needed to support a parole denial decision." Petition at
11 11.

12 In Biggs, the Ninth Circuit found that parole denial based
13 solely on the gravity of the commitment offense can initially
14 satisfy due process requirements, and that the "some evidence"
15 standard could be satisfied by the Board's consideration of the
16 gravity of the offense. However, in dicta, the Biggs court held
17 that courts may also consider the parole board's decision-making
18 process over time: "The Parole Board's decision is one of
19 'equity' and requires a careful balancing and assessment of the
20 factors considered. . . . A continued reliance in the future on an
21 unchanging factor . . . runs contrary to the rehabilitative goals
22 espoused by the prison system and could result in a due process
23 violation." Biggs, 334 F.3d at 916-17.

24 Nevertheless, the Board's decision at issue here does not
25 rise to a due process violation. Although the Ninth Circuit has
26 stated that, over time, continuous denial of parole based on the
27 commitment offense could result in denial of due process, see id.

1 at 916-17, it has not specified the number of denials or the
2 length of time served beyond the minimum sentence that would
3 constitute a due process violation. District courts which have
4 granted habeas petitions challenging the Board's decisions
5 addressed situations involving more denials of parole than in the
6 instant case. See e.g., Irons v. Carey, 358 F. Supp. 2d 936, 947
7 (E.D. Cal. 2005) (finding due process violation in denial of
8 parole at fifth parole suitability hearing after petitioner had
9 served sixteen years of a seventeen-years-to-life sentence for
10 second degree murder with a two-year enhancement for use of
11 firearm where all factors indicated suitability for parole),
12 rev'd, 479 F.3d 658 (9th Cir. 2007) (given the egregiousness of
13 the commitment offense, due process not violated when Board deemed
14 petitioner unsuitable for parole prior to expiration of his
15 minimum term); Johnson v. Finn, 2006 WL 195159, *12 (E.D. Cal.)
16 (finding due process violation in denial of parole at twelfth
17 parole suitability hearing after petitioner had served twenty-four
18 years of sentence of life with the possibility of parole for first
19 degree murder where all factors indicated suitability for parole).

20 Further, the Board also found that Petitioner lacked a
21 realistic parole plan. Petitioner does not challenge this
22 finding, which also provides some evidence to support the Board's
23 denial. Instead, Petitioner argues that he is entitled to parole
24 "if he either has developed marketable skills while in prison or
25 has acceptable parole plans." Traverse at 21. However,
26 Petitioner misinterprets California Code of Regulations title 15,
27 § 2402(d), which simply provides examples of circumstances that
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1 "tend to show that the prisoner is suitable for release." The
2 provision makes clear that the examples "are set forth as general
3 guidelines" and "the importance attached to any circumstance or
4 combination of circumstances in a particular case is left to the
5 judgment of the panel." Id.

6 Accordingly, the superior court's finding that some evidence
7 supported the Board's finding that Petitioner was unsuitable for
8 parole was not contrary to, nor an unreasonable application of,
9 clearly established federal law. However, if Petitioner
10 establishes a realistic parole plan and continues his positive
11 behavior in prison and the Board continues to deny parole based
12 solely upon unchanging facts such as the nature of the crime, the
13 Board's decision may eventually amount to a due process violation.
14 See Biggs, 334 F.3d at 916-17.

15 II. Violation of the Plea Agreement

16 Petitioner also argues that he was "unconstitutionally denied
17 [an] owed reciprocal benefit from his plea agreement." Petition
18 at 14. He argues that denial of parole denied him "his owed
19 'reciprocal benefit' of 'lessened punishment.'" Id. at 15.
20 However, Petitioner has not demonstrated that any promise in his
21 plea agreement was breached.

22 Petitioner cites People v. Collins, 21 Cal. 3d 208 (1978),
23 for the proposition that when accepting a plea bargain, "the
24 defendant agrees to plead guilty in order to obtain a reciprocal
25 benefit, generally consisting of a less severe punishment than
26 that which could result if he were convicted of all offenses
27 charged." Id. at 214 (quoting People v. Orin, 13 Cal.3d 937, 942
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(1975)). However, Petitioner does not allege that the sentence he received was the same as or greater than the sentence he would have received if convicted at trial, nor would this be the proper forum for raising that challenge.

Petitioner has not demonstrated that the denial of parole after he served less than twelve years of his fifteen-year-to-life sentence breached any promise made in his plea agreement.

Further, Petitioner does not allege any constitutional violation that would support the grant of a writ of habeas corpus.

III. Bias

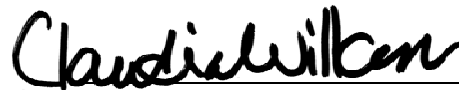
Finally, Petitioner alleges that the Board's decision to deny him parole was based on unlawful bias against those convicted of murder. Petitioner did not raise this claim in his state habeas petition. Therefore, it is unexhausted. See 28 U.S.C. § 2254(b). It is denied as without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: 6/14/ 07



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CHINN,

Case Number: CV05-03425 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

KANE et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 14, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: June 14, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk